So-White Freight Lines, Inc. *and* William A. Warner. Case 30–CA–10381

January 18, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On July 17, 1990, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions,[2] to amend the remedy, and to adopt the recommended Order, as modified.[3]

AMENDED REMEDY

Having found that the Respondent unlawfully permanently laid off employee Warner, the judge recommended that the Respondent be ordered to offer him reinstatement and to make him whole for any loss of earnings he may have suffered as a result of the discrimination against him from the time of his November 28, 1988 layoff to the date he is offered reinstatement.[4] In doing so, the judge refused to limit Warner's backpay eligibility ''by an alleged date on which he otherwise would have been laid off after November 28, 1988.''

Contrary to the judge, we find that the Respondent is not precluded from the opportunity to show at the compliance stage of this proceeding that, had it not laid off Warner for unlawful reasons when it did so, it nevertheless would have laid him off for lawful reasons at a later date.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, So-White Freight Lines, Inc., Plover, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a).

''(a) Offer William Warner immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.''

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule a judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find it unnecessary to pass on the judge's finding that the reasons advanced by the Respondent for suspending and laying off Warner were pretextual. Instead, in finding that the Respondent has violated Sec. 8(a)(3) and (1) of the Act, we rely on the judge's finding that the Respondent failed to satisfy its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to show that it would have suspended and laid off Warner even in the absence of his protected concerted and union activities.

[3] We shall modify the reinstatement language in the judge's recommended Order to conform to that traditionally used by the Board. No modification is required in the notice.

[4] The judge inadvertently failed to provide that Warner's backpay is to be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

[5] *Programming & Systems*, 275 NLRB 1147, 1148 (1985).

Joyce Ann Seiser, Esq., for the General Counsel.
Paul J. Zech, Esq. (Felhaber, Larson, Fenlon & Vogt, P.A.), of Minneapolis, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On a charge filed by William E. Warner, on March 7, 1989,[1] a complaint was issued alleging that So-White Freight Lines, Inc., Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by suspending and subsequently laying off Charging Party William Warner because he concertedly solicited complaints of Respondent's employees regarding their wages, hours, and working conditions, and brought the complaints to the attention of Respondent. Respondent denies the allegations.

A hearing was held in Stevens Point, Wisconsin, on July 11. On the entire record in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the interstate and intrastate transportation of chemicals and other commodities. The complaint alleges, the Respondent admits, and I find that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that General Teamsters Union, Local No. 662, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–

[1] All dates are in 1989 unless otherwise stated.

CIO (Union) has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent, which has a terminal at Plover, Wisconsin, was established in 1986 to distribute the products of an affiliated company, So-White Chemical Company, namely, bleach, ammonia, fabric rinse, pool chlorine, and windshield wash. Eventually, it expanded its original fleet of two trucks so that it could handle long-haul outbound loads of other companies. In 1987 it had a total of 17 trucks. From its beginning, Respondent operated at a loss.[2]

In May 1988 Respondent hired Gary Maluka to manage the Company and determine why Respondent was losing money and what should be done to end the losses.

In August 1988 So-White Chemical lost a major contract that it had had with the Department of the Army for several years.

When its losses continued notwithstanding a rate increase, Respondent, on September 1, 1988, distributed the following, General Counsel's Exhibit 2, to its employees:

> A management decision has been made to cutback on out-bound loads for other shippers unless a profit can be anticipated. So-White Chemical will continue to be our principal customer.
>
> Over the next few weeks we will be reducing our operations. We plan to run our best trucks and drivers on an as needed, as available, basis. This will mean that some of the employees will be reduced to part time.
>
> Please see Gary Maluka or Mike Stensberg if you have specific questions on the plans for the next few weeks.

In November 1988 Respondent was faced with the renewal of the annual registration and licensing of its trucks at a cost of $18,000 per truck. it decided not to register some of its trucks and to reduce its staff. Some of the trucks were sold and others were parked or used for spare parts. Respondent laid off mechanics and a dispatcher. Another dispatcher was transferred to another company. Truckdrivers were also laid off, with Warner being the first.[3] Assertedly, driver Robert Ward was scheduled to be laid off the same time as Warner but Ward, during his last run, was injured and he went on workmen's compensation. At the time of Warner's layoff, some of the other drivers were on reduced hours or on workmen's compensation.

The layoffs were made according to a layoff list prepared by Maluka and dispatcher Ronald Eckes (G.C. Exh. 8). Assertedly, the drivers' position on the list depended on his or her performance.[4] Both Maluka and Eckes agreed that Warner deserved to be at the bottom of the list of 15 drivers because of his poor performance.[5] The other dispatcher, Elaine Bauman, agreed.[6] Maluka testified that Warner was listed as the first to be laid off because:

> He was undependable. We put a load out to him to schedule him for delivery, and he may take it or he may not. He may call you on it and tell you ''No, I can't make.'' at the last minute. Then you gotta scramble around and try to find some other driver for it. He may just take off from [sic] and not be there on time. Typically the one trip that comes to mind is one we got involved in, where he went up to Duluth. When he couldn't take the Georgia trip he went up to Duluth and it was supposed to be that move there, go up to Duluth, make your delivery at Gateway, pick up a back haul, come back and deliver the back haul. And it would take five hours to get there, unload, pick up your backhaul, and then the next day make your deliveries. And that would be a two day trip. That is what we would normally schedule someone for. There are always problems with Bill it seems, so that it turned into a three day trip before he finally could get his load off. That wasn't unusual.

Maluka also testified that Respondent received customer complaints about Warner's personal appearance with one customer complaining that Warner wore a sweatshirt that was ripped and had holes in it and cutoff blue jeans with holes in them;[7] that Warner came late to a safety meeting and he complained after the meeting was over; that Warner incurred ''lumper'' (unloading) charges which seemed excessive and which involved places where other drivers would deliver without lumpers;[8] that while he heard that Warner drank, he did not take into consideration Warner's suspension for having alcohol on his breath, after returning from a lunchbreak (G.C. Exh. 11(b)), since Warner ''had a full explanation that it was a non-alcoholic beer''; that he was concerned as to whether Warner would be under the influence of alcohol when reporting for work on Monday morning; that

[2] Profit-and-loss statements showed that Respondent experienced a loss of $54,143 in 1986, and a loss of $265,318 in 1987, R. Exhs. 1 and 2, respectively. R. Exh. 3 shows that Respondent had a loss for each of the months of 1988, beginning with a loss of $31,040 in January and experiencing losses of $27,937 in October, $41,433 in November, and $50,917 in December. Total losses of $394,699 were recorded for 1988.

[3] According to G.C. Exh. 6, Respondent, at the time of the hearing herein, employed six drivers. Five drivers were laid off after Warner. Apparently, the three or so other drivers left before they were laid off. Only one of the laid-off drivers was recalled, Don Korbitz.

[4] Assertedly, criteria included the efficiency of the trucks and deliveries, dependability of the drivers, availability and flexibility of the driver to work weekends, the driver's attitude, safety, preparation and completion of paperwork, customer complaints, ability to get the job done, dispatcher complaints and other general problems.

[5] Eckes testified that during the time he and Maluka made up the list rating the drivers, they never had any discussions about a rumor that Warner was interested in having a union; and that while he heard Warner was interested in having a union at the Company, it had no bearing on his decision to put him at the bottom of the list. Eckes also testified that if Warner was not laid off in November 1988, he would have been laid off in February 1989.

[6] She was Elaine Bottensek during her employment at Respondent's Plover facility. Bauman pointed out that one time Warner telephoned her and told her that he was in Madison, Wisconsin, and he could not make his drop when in fact Terry Weir, the production manager at So-White Chemical Company, told her that he had just seen Warner a short distance from Respondent's facility. The involved load had to be rescheduled for the following day, according to Bauman's testimony. Bauman could not explain why this alleged incident was not documented and why there was no disciplinary action taken. Weir corroborated Bauman, testifying that the incident occurred in the summer of 1988.

[7] Maluka testified that he personally observed Warner on two occasions wearing a holely T-shirt and holely cutoff jeans.

[8] On cross-examination Maluka testified that the normal procedure is for the driver to receive advance authorization from the dispatcher before he uses a lumper.

Warner refused a trip to Georgia and the reasons he gave as to why he couldn't take it did not hold water or didn't seem logical or reasonable at the time; that they did not have Warner's paperwork in at the time but they believed that he should have been able to make the trip to Georgia on 3 days' notice and yet he chose not to do it;[9] that Warner received a suspension over this refusal (G.C. Exh. 1 (a)); and that Warner indicated that he did not want to drive a tanker anymore because he felt he was not paid enough considering the risks involved in transporting hazardous materials. Also, it is asserted by Respondent's witnesses that Warner lied to a dispatcher about his whereabouts; that empty beer cans were found in a truck driven by Warner and other drivers; that Warner hauled loads without shipping papers and transported hazardous materials without appropriate placards in violation of the Federal Department of Transportation (DOT) rules; that Warner delivered loads late, receiving a warning notice for, among other things, the late delivery of a tanker load (G.C. Exh. 11(c)); that Warner's late deliveries affected Warner's ability to handle backhauls without a layover; that Warner delivered product to the wrong place;[10] that on an average of once per month Warner would be late reporting to work on Monday mornings;[11] and that this, on one occasion, caused Respondent to have to sell the product to a warehouse at a cut rate when the customer rejected the load when it arrived late.

Respondent's president, Thomas Teske, testified that Warner belonged at the bottom of the layoff list, or in other words he should have been the first to be laid off, because he was told by the dispatchers that Warner and Ward were not carrying their weight in that they were not making the deliveries and traveling the miles as the other drivers were; that Warner did not show up for work on time[12] and he would fail to make deliveries on time; that customers would complain;[13] that he would miss backhauls; that he believed that Warner had a problem with alcohol because he had heard of the suspension for drinking alcohol while on the job and the fact that beer cans were found in a truck Warner drove; that Warner promoted himself as a qualified tank truckdriver when he was hired but after handling a few tanker loads of hazardous material, Warner refused to handle these loads; and that Warner handled a hazardous load without proper documentation or placards.

With respect to Warner's record, he began working for Respondent in April 1987, and on October 16, 1987, Warner received two warnings (G.C. Exhs. 11(e) and (f)). Respectively, the first was for damaging a trailer door. The second was for mixing up deliveries.

On November 9, 1987, Warner received a warning for violating DOT's regulations regarding the 70-hour, 8-day rule and the 10-hour driving rule (G.C. Exh. 11(d)).

On February 25, 1988, Warner received a warning (G.C. Exh. 11(c)), which indicated that he left the pant with no paperwork and he returned with no paperwork, he had no knowledge as to the type of product he was hauling, he had the wrong placards on the tanker trailer, he had no signed receipt from the customer and he was at least 3 hours late.

In early March 1988 Warner mailed a list of concerns to his fellow drivers excluding those in Milwaukee, Wisconsin (G.C. Exh. 50) which is attached as Appendix A.[14] Approximately 16[15] letters or lists were mailed and Warner testified that he received about 13 or 14 back.

On March 24, 1988, Warner received a warning which included a 3-day suspension (G.C. Exh. 11(b)). The ''COMPANY REMARKS'' section of the warning indicates ''[s]mell of alcohol on the breath after returning from lunch. Company policy does not permit this.'' In the ''EMPLOYEE REMARKS'' section of the warning, the following appears: ''the smell was not alcohol. We had two cans apiece of Kingsbury *non*-alcohol malt beverage with our lunch. Can obtain written statement to this fact. When tried to explain this to Diane [Sparks, the terminal manager] she hung up on me. Do not believe this warning justified.'' (Emphasis in original.)

Warner testified that after he sent the above-described letter (G.C. Exh. 50) to the drivers and after he had received most of the replies, he received the March 24 warning; that at the time he was injured and he was doing light duty in the office; that he went to lunch with John Sparks at the Dugout Pub and Grill where they had sandwiches and a couple of nonalcoholic Kingsburry drinks; that when they returned to work Sparks told him that there was nothing for him to do so he could go home; that Spott called him about 4 p.m. and told him that they had both been suspended for drinking on the job; that he telephoned Sparks and she said that he had alcohol on his breath; that when he tried to explain Sparks hung up; that the following Sunday he brought Roger Taske a can of the nonalcoholic beer and an affidavit from a waitress and a person from the pub;[16] ''that Roger Teske said that he would look into the matter; that no one from the Company talked to him about the incident before issuing the suspension; and that on another occasion one of the mechanics told him that some beer cans were found in the side compartment of a truck that he and three or four other drivers used but the beer cans were not his.

Thomas Bodzislaw, who worked as a truckdriver for Respondent, testified that while he was doing light-duty work in Respondent's office in March or April 1988, he was told to check Warner's logs for violations since he was ''screwing off.'' Bodzislaw testified that he overheard Eckes saying that Warner would not put his unloading hours in the off-duty section of the log but rather placed them in the on-duty

[9] Another of Respondent's truckdrivers, Linda Davis, testified that during the few months that she drove for Respondent she had to tell Respondent's dispatchers four to six times that she could not take a load because she did not have enough hours left. She was never disciplined for not having sufficient hours to handle the loads. At the time of the hearing, Davis had lived with Warner's sister for 8 years.

[10] Eckes corroborated Maluka on Warner's misdelivery of product.

[11] Bauman pointed out that Warner's lateness on Monday mornings had a domino effect in that the deliveries were by appointment brokers arranging the backhauls and would give the load to someone else if it was not picked up on time, and if Respondent lost the backhaul its dispatchers would have to look for other loads.

[12] Thomas Teske conceded that while Warner's employee data calendar has a place for marking days when an employee arrives for work late, there were no marks of this kind on Warner's calendar. G.C. Exh. 52.

[13] While Thomas Teske testified that there probably was documentation of the customer complaints, such documentation, if it exists, was not produced at the trial.

[14] General Counsel explained that the list introduced was one of those returned by one of the truckdrivers since a blank copy was not available.

[15] Errors in the transcript are noted and corrected.

[16] Roger Teske testified that he did not remember the can that Warner gave him but he, Teske, the night before he testified purchased a six-pack of nonalcoholic Kingsburry Beer and the label indicated that it contained one-half of 1 percent alcohol. Apparently the label reads less than one-half of 1 percent alcohol.

section of the log. According to Bodzislaw, Warner was making these entries in the log the proper way.

Warner testified that in the end of March or the beginning of April he spoke with Terminal Manager Diane Sparks, asking her to set up a meeting with Supervisor Roger Teske, who is the son of the president of Respondent; that he told Sparks that he wanted to set up a meeting with Roger Teske to talk about some of the concerns of the drivers; and that Sparks said that Roger Teske had already seen a copy of the letter,[17] agreed with parts of it, and would meet on Saturday at ''10 o'clock.'' Assertedly, the meeting was to take place on the first Saturday of June.[18]

In May 1988 Warner had a chargeable accident (G.C. Exh. 49).

Also in May 1988, Warner received an evaluation (G.C. Exh. 10). Most of the ratings on the ''Driver Personnel Review Form'' are average with Warner receiving ''GOOD'' ratings on safety, care of equipment, and customer relations and ''FAIR'' on punctuality. The remarks portion of the form concludes with ''You try to do too much in a day, Mondays appear to be especially difficult. Please try to schedule your time to avoid speeding and late deliveries.''

According to the testimony of Warner, Roger Teske did not show up for the meeting on the first Saturday of June 1988 and when he, Warner, mentioned this to Sparks, she indicated that Roger Teske changed the meeting to the following Saturday at 10 a.m. at the chemical plant, which is next door to Respondent's facility. Warner testified that subsequently Sparks told him that Roger Teske indicated that he did not want to talk to more than two of the drivers at a time.

Warner arranged a picnic on July 30, 1988, for Respondent's drivers. Warner testified that he made a flyer announcing the picnic and tried to have copies made at the chemical plant. He was told that since it was not a company-sponsored picnic he could not use the copy machine. Warner had copies made and he put them on the drivers clipboards and one on the bulletin board in the hall. The flyers did not say anything about a union. But in talking with the drivers, Warner told them that the purpose of the picnic was to determine whether they should go to a union. About eight drivers attended the picnic. It was decided that Warner should contact a union. Bodzislaw, who at the time worked in Respondent's office on light duty, testified that at that time Eckes said that Warner was a ''pain in the ass, causing trouble with the union'' and that Eckes said that Warner ''is tryiny to organize a union in here.'' Roger Miller, Respondent's safety director, assertedly told Bodzislaw that Warner was organizing the picnic.

During the first week in August 1988 Warner contacted a local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Warner was told that the Teamsters was trying to organize So-White Chemical and it did not want to be trying to organize both companies at the same time.

After the picnic and after he spoke to the union representative, Warner had occasion to be in Respondent's office when a load was not ready when he arrived at the facility. Warner testified that he would get called in to leave with a load and it would take 4 hours after he got there to have the truck loaded. Assertedly Eckes was present and he, Warner,[19] said ''this stuff will asked change . . . if the union is in here'' or ''things would be better around here once the union is in.''[20]

On September 26, 1988, Warner received a warning which included a 3-day suspension (G.C. Exh. 11(a)). The ''Company Remarks'' section of the warning reads:

> Refusing to leave at So-White Lines in time to make delivery in Forest Park Ga. 7:00 am Monday 9-26-88
>
> We had to find another driver to cover the load so not to be late on the delivery time and chance of the load spoiling as it was a perishable load.
>
> Oral warnings on calling in late and/or not calling as directed in the company policy book.

The ''Employee Remarks'' section of the warning contains the following:

> 1. Wasn't hired for long hauls recently refused long haul tractor. Ad I answered stated 3 day runs 900 plus miles long haul
>
> 2. told by Roger Miller he had found *trade* and I owed Lee Barz that was Sat. Fri could not reach dispatch
>
> [3.] Work Thursday trip could not have made trip on time.
>
> 4. turned down long haul truck several months ago not very many trucks in fleet suitable for long haul.
>
> 5. Was told by Ron Eckes Thursday to call in Friday 4:30 PM which I did. His standard practice.
>
> 6. other drivers have refused trips no action taken. I didn't refuse load first stated I couldn't make 7:00 AM Monday.
>
> 7. this is exactly the kind of problems drivers want to discuss with management meetings were set up management didn't show up.
>
> 8. Feel this is first a way of not paying unemployment when work shortage is forecasted by management letter to drivers.
>
> 9. I also feel I am being harassed by company because I refuse to run illegal and my attempt to listen to drivers problems and relate them to management,

[17] Sparks corroborated this, testifying that she saw a one-page list of driver complaints, Warner admitted to her that he had written it, and she gave a copy of the list of complaints to and discussed the list with Roger Teske. Roger Teske denied seeing the letter or anything like it at that time. Thomas Teske also denied seeing the letter at that time. Thomas Teske testified that he never heard of any effort on the part of any employee of the Respondent to bring in a union; that he himself at one time belonged to a union, and his father was once fired because he belonged to a union; and that he would reprimand any supervisor who was engaged in antiunion activity. Sparks testified that she did not recall ever hearing any comments about unionization or other organizing among the drivers at Respondent.

[18] Sparks testified that Warner asked for a meeting with Roger Teske and that the normal procedure was for her to tell the drivers who asked to see Roger Teske that he would be available on Saturdays and Sundays, usually in the afternoon; that she did not recall ever scheduling a 10 a.m. appointment for Warner to meet Roger Teske; that Warner asked more than once to see Roger Teske; and that Warner and driver Dave Lepak together testified that Eckes made this statement. Subsequent testimony, however, demonstrates that Warner made this statement.

[19] At Tr. 116, L. 18, it initially apprars that Warner testified that Eckes made this statement. Subsequent testimony, however, demonstrates that Warner made this statement.

[20] This statement was not included in the affidavit Warner gave to the National Labor Relations Board (Board).

and management personal [sic]. I talked to [sic] has since been laid off.

10. I also worked one day of suspension because it benefitted the company. Date of warning 9-26-88 was dispatched Sat. to Duluth Minn. 6:00 A.M. Monday.

Under the above-described quoted material the following appears:

TOM T.

2. told Bill Warner that Lee was going to take load *after* Bill refused to make delivery time.

5. Did not call in till 5:30 pm.

6. Had time to make delivery [by] leaving Sat afternoon. only 912 miles, was off 2-1/2 days. Tom Bill has been a problem with using up his hours by logging every stop. on duty not driving Then he is always out of hours.

Roger Miller's signature appears under the last of the above-quoted portions of the warning.

Regarding this warning, Warner testified that he received the dispatch on the morning of September 24, 1988; that when he was told that he had to be in Atlanta, Georgia, at 6 a.m. Monday, he told the dispatcher that he was not hired to handle long hauls[21] and that he did not have enough hours to make the delivery on Monday morning[22] but could make it on Tuesday morning; that he asked the dispatcher if he could find someone to trade loads; that the dispatcher called him back and said Roger Teske said that if he did not take the load he would be suspended; that the dispatcher called later and indicated that driver Lee Barz would take the load and Warner would take Barz' load to Duluth; that he made the run to Duluth and when he returned he was advised that he had been suspended but that he was to handle another load before starting his suspension; and that he had turned down dispatches for long hauls prior to this one and he had never been disciplined.

Linda Davis, who was a truckdriver for Respondent, testified that while she was performing light duty in Respondent's office in mid-October 1988 she overheard a conversation between Maluka and Eckes and one of these individuals said that the owners of the Company, the Teskes, ''didn't like the idea of Bill starting a union, and they wanted to get him either to quit or something.'' Maluka testified that he never had this conversation or any conversation with Eckes about Warner's union activities since he was not even aware of Warner's union activities; and that neither of the Teskes said anything to him about Warner supposedly being involved with union activities. Eckes testified that he did not recall ever having a conversation with anyone at Respondent about Warner's alleged interest in the Union. And Bauman testified that she never heard Maluka and Eckes discuss Warner's attempt to get a union in at Respondent.

Davis also testified that around the first of November 1988 she overheard another conversation between Maluka and Eckes during which they indicated that ''they didn't like the idea of the union, that Bill was causing too much trouble, they wanted to get him to quit by giving him crappy loads and harassing him.''

Bodzislaw testified that in the fall of 1988 he heard Respondent's supervisor, Roger Teske, tell Eckes to get rid of Warner since he, Roger Teske, was getting tired of ''screwing around with him''; and that Maluka was present.[23]

Warner received notice of his layoff on November 28, 1988, when he telephoned Eckes and asked him about being dispatched. Eckes said that things were slow and the Respondent was going to lay Warner off for a while. He testified that prior to his layoff he had never been told that he was at risk of being discharged for any of his conduct as a driver.

On an absence report of Warner, filled out after Warner was laid off, Maluka wrote ''Do not expect to rehire.''

Davis, who was laid off in January 1989, returned periodically to Respondent's office to drop off her doctor's bills and check to see if Respondent had any kind of work for her to do. On about March 1, 1989, while she was in Respondent's office, she asked Maluka who Respondent would rehire if the need occurred. Assertedly Maluka said that Respondent would not rehire Warner. Maluka testified that he may have discussed the fact with Davis that it was unlikely that Warner would be recalled; and that his conclusion would have been based on the fact that there was no work available for him.

Warner testified that in February 1989 he asked Maluka if he was permanently laid off and Maluka replied, ''I guess so.''

On about May 1, 1989, Davis was again in the office to see if Respondent had any work. She and Maluka discussed the fact that Respondent was starting to recall drivers. Davis testified that Maluka said that Warner would not be recalled because he was trying to get the Union in. He had a suit going with the Labor Board, and he had a poor attitude. On rebuttal, Warner testified that the only time he could remember wearing torn up shirts and cutoff jeans while on duty was when he spilled bleach or chlorine he handled while working and it made holes in his clothes; that no customers complained to him about his clothes and none of Respondent's supervisors told him that customers complained to him about his appearance; that he hauled two or three tanker loads of methanol during one pay period; that he hauled tanker loads of bleach water but subsequently he refused to take the bleach water to Milwaukee; that he subsequently refused to handle the methanol because ''it was a dangerous chemical and the money wasn't worth it'' and he refused to handle the

[21] Warner pointed out that the ad he answered indicated that the trips would be 1 to 3 days and said nothing about trips longer than 3 days. Respondent introduced the ad and said it ran around the time Warner was hired. R. Exh. 16. The ad reads, in part, as follows: ''We offer 1, 2, and 3 day runs primarily mid-west.'' Sherri Teske, Roger's wife, testified that she interviewed Warner and she thought that she made it clear to Warner that ''[w]e didn't go way, way out east, New York, every day. But we were looking for people who could do some traveling.''

[22] Warner pointed out that G.C. Exh. 51 shows that he had 18.5 hours remaining in his 70-hour work week. Also, he testified that, depending on traffic, it would take 22 to 24 hours to legally drive from Milwaukee to Atlanta, Georgia, during a weekend; that he does not drive long haul so that he has not driven the route; that when he told the dispatcher that he did not have enough hours, the dispatcher did not have any way of knowing how many hours he had already driven in his 70-hour week; and that no one called and talked to him about this before the suspension was issued.

[23] Bodzislaw also testified that he heard people in the office discussing the fact that Warner was trying to get the Union in there and cause trouble among the drivers; and that he did not know who said this. Roger Teske testified that he was sure that he said that Warner was ''screwing off'' too much but since he, Roger Teske, did not know about the Union other than suspecting Lepak of union affiliation, he could not have made a comment that Warner was creating problems because of the attempt to unionize the drivers.

bleach water because it was being dumped in the Milwaukee sewer system so that Respondent would not have to pay for sewerage disposal in Stevens Point; that in his opinion the unloading procedure utilized with the bleach water was not safe and the tankers used to transport this product ''were in pretty rough shape . . . in that the caustic would blow out the valves''; additionally he never called the terminal and said he was in Madison when he was not in Madison; that he was advised about customer complaints about late deliveries once or twice; that for a while Respondent had drivers come in for loads and they had to wait for the trucks to be loaded and this resulted in the late deliveries; that possibly two or three times he made deliveries late because he himself was late; that he came to work late on Monday mornings maybe once a month or once in a month and a half. Also Bauman once said something to him about being late on Mondays; that the normal procedure regarding lumpers was to get Eckes to okay it before the driver used the lumper; that on his September 1988 trip to Duluth he was supposed to pick up a load of salt but it was not ready until the day after he showed up to make the pickup (G.C. Exh. 52(a) and (b)); that he handled a tanker load without paperwork because he assumed that the paperwork in the cab of the truck was the correct paperwork for the involved load; that subsequently he handled tanker loads and he followed the correct procedure; that one of his misdeliveries was due in part to the failure of dock personnel at Respondent's subsidiary company to set up the load according to the instructions on the cover sheet of the shipping documents; and that his other misdelivery occurred because he had to drop part of a load off at a company other than designated store because he could not get under a bridge to make the delivery to the designated store.

B. *Contentions*

General Counsel, on brief, contends that Warner engaged in union and protected concerted activities; that Respondent was aware of this and it manifested its hostility by suspending Warner on September 26, 1988, and laying him off on November 28, 1988, as a result of these activities; that Respondent did not demonstrate that it had a legitimate, consistent, objective, and nondiscriminatory rationale justifying Warner's selection for layoff in the absence of his activities protected by Section 7 of the Act; that Respondent offered varying and inconsistent subjective reasons for Warner's selection for layoff and it failed to submit documentary evidence to substantiate its subjective reasons for Warner's selection; that Respondent failed to rely on available objective indices of Warner's job performance which proved him superior to other less senior drivers. Also that the subjective reasons offered by Respondent for Warner's layoff were typically based on either unsupported accusations or isolated incidents, which were generalized and embellished far beyond the severity accorded them at the time; that knowledge of employee protected activity may be inferred from the small number of employees, especially where the activity has been discussed in the facility, *Mitchell's Disposal Service*, 260 NLRB 150, 154 (1982). In addition Roger Miller, an admitted supervisor and agent of Respondent, was also one of the drivers employed until Warner's layoff in November and therefore he, Miller, was in a position to know of the organizing among the drivers; that Respondent's knowledge of and hostility toward Warner's union activities was evidenced by statements made in the office by supervisors and/or agents as overheard by Bodzislaw and Davis, who risk not being recalled from layoff as a result of their testimony; that Warner engaged in protected concerted activity by (a) distributing a letter soliciting employee comment and support, (b) organizing a meeting of employees on July 30, 1988, to discuss the advisability of organizing into a union, and (c) and being chosen by those in attendance on July 30, 1988, to contact the Union; that directions given to Bodzislaw to check Warner's logs, in particular, for violations, supports an inference that Respondent became hostile toward Warner's activities as early as March 1988 and began looking for a way to get rid of him. Additionally that Warner's September 28, 1988 suspension was not warranted by any reasonable nondiscriminatory business rationale for while Maluka testified that Warner was suspended for refusing to cooperate to take a load without a good excuse, Warner had told Miller that he, Warner, did not have enough driving hours left to make the delivery on schedule, and he had refused long hauls in the past without being disciplined; that Davis had refused loads 4 to 6 times telling the dispatcher that she was out of hours and she was never disciplined; that Respondent employed 15 drivers effective November 18, 1988, and Brodzislaw, Davis, and Ward were working in the office on light duty at that time; that Warner was the sixth most senior driver of the 12 drivers at the time of his layoff; that Brodzislaw and Davis were laid off from their office jobs in January 1989; that Respondent laid off three more drivers on February 10, 1989, namely, Goodwin (fourth in seniority), Korbitz (13th in seniority), and Miller (11th in seniority). Also regarding Warner's alleged drinking problem, it is incredible that Respondent's supervisors believed that one of their over-the-road truckdrivers had a drinking problem but they never talked to him about it or counseled him about it; that the alleged drinking problem is a baseless accusation and an exaggeration of one incident in March, which did not even merit mention on Warner's May evaluation; that regarding lateness and missing loads, Respondent did not introduce any documents showing the excessive length of Warner's holdovers or late deliveries; that while Maluka testified that Warner's trip to and from Duluth took 3 days because Warner was late in arriving at Duluth, Warner's testimony that he was not late because they unloaded him at Duluth was not contradicted; that Respondent offered no documentary evidence that Warner's expenses for lumpers were higher than other drivers, and such charges were preauthorized and preapproved by dispatch; that there was no documentation of customer complaints about Warner's appearance; that regarding his alleged lying about truck problems in Madison, the questions which beg for an answer are why would he make such a telephone call only a mile from Respondent's facility and why would he not be disciplined for so serious an infraction. Additionally that all objective data, including seniority, personnel review forms, employee warning records, logging violation reports, accident reports, the driver safety board, citations, and truck expense calculations evidence that Warner was not the worst driver; that drivers Mark Allen (ranked number 2 on the layoff list) and Donald Korbitz (ranked 9 on the layoff list) received poorer personnel reviews in May 1988 than did Warner (who was in effect ranked 15 on the layoff list); that Allen, Korbitz, and driver Robert Ward had worse discipli-

nary records than Warner; that Warner's truck was operating at the fourth best per-mile cost; that given the subjectivity of the reasons for Warner's layoff, Respondent cannot disentangle its subjective hostility toward Warner's work performance from its subjective hostility toward his union and protected concerted activities, and, therefore, Respondent cannot prove that it would have taken the same actions absent Warner's union and protected concerted activities; and that it would be inappropriate to limit Warner's eligibility for backpay by an alleged date on which he would have been otherwise laid off after November 28, 1988, since the evidence of record is insufficient to prove that Warner would have ever been laid off based on nondiscriminatory considerations.

Respondent, on brief, argues that Respondent's decision to lay off drivers followed an informal ranking based on their performance, experience, reliability, and interaction with the dispatch department; that Warner received the lowest ranking and, therefore, was the first driver to be laid off; that the decision to suspend and layoff Warner was the result of legitimate business reasons and at no time the result of any union activities on the part of Warner; that the General Counsel has failed to establish a prima facie case in that (1) the General Counsel's evidence of union activity on the part of the Warner is extremely limited, (2) the General Counsel failed to establish that Respondent had knowledge of any union activity by Warner and the small-plant doctrine is not applicable since General Counsel has failed to establish that Respondent had reason to notice the union activities in the facility and an off-the-cuff remark to Dispatcher-Supervisor Eckes is insufficient to adopt the small-plant doctrine, and (3) the General Counsel has failed to show antiunion animus and Davis' testimony is extremely suspicious and lacks credibility since not only is she involved in a lawsuit against Respondent, but also she has been living with Warner's sister over the past 8 years; that the evidence is clear and overwhelming that Respondent laid off employees for economic reasons since it was losing approximately $30,000 per month during 1988; that the Board has held that an employer does not violate the Act where despite a showing of a prima facie case, layoffs were motivated by economic reasons, *Gem Urethane Corp*., 284 NLRB 1349 (1987); that the evidence is clear and overwhelming that Warner was the first driver laid off because of his performance in comparison to other drivers; that as a result of Warner's specific performance problems including tardiness, refusal to deliver loads, lying to dispatchers, misdeliveries, and excessive lumper expenses, Warner was rated last among all of the drivers; that General Counsel has failed completely to show any causal connection between the suspension and subsequent layoff of Warner and his protected concerted activities and union activities; that regarding timing, Warner's last concerted activity occurred in July 1988, ''five'' months before he was laid off; that had the initial layoff not occurred, Warner would have been laid off in February 1989 since he was not rated as a top driver and General Counsel never offered any proof that Warner deserved to be rated higher than 15th; and that even if General Counsel was able to establish a causal connection between Warner's union activities and his November 1988 layoff, he would have been subsequently laid off in February 1989.

C. *Analysis*

As noted above, the complaint herein alleges that Warner concertedly solicited complaints of Respondent's employees regarding their wages, hours, and working conditions; that Warner brought the complaints to the attention of Respondent; and that he was suspended and subsequently permanently laid off because he engaged in the conduct described above and in order to discourage employees from engaging in such activities for the purpose of collective bargaining or other mutual aid or protection. I agree.

General Counsel demonstrated that Warner engaged in concerted protected activity and union activity in that he circulated a list of concerns to the other drivers, he arranged a meeting/picnic of the drivers so that they could determine whether to seek union representation, he acted as the group's representative in trying to get a union to represent the involved employees, and he tried to meet with Roger Teske to discuss the concerns of the drivers.

General Counsel also demonstrated that Respondent knew of Warner's activities. Sparks testified that she showed Roger Teske the list of concerns drafted by Warner and she discussed the list with Roger Teske. At that time she told Warner that Roger Teske had seen the list of concerns and agreed with parts of it. Roger Teske's testimony that he did not see the list of concerns at the time is not credited. It appears that Roger Teske decided that the best approach in the situation at hand was to deny knowledge of Warner's protected activities. The overwhelming weight of the evidence in this record demonstrates, however, that Respondent knew of Warner's activities. Eckes was overheard saying that Warner was a ''pain in the ass, causing trouble with the union . . . [he] is trying to organize a union here'' at the time of the drivers' July 30, 1988 picnic. Bodzislaw is credited on this point. He impressed me as being a forthright individual. On the other hand, Eckes testified only that he did not recall ever having a conversation with anyone at Respondent about Warner's alleged interest in the union. Eckes conceded that he heard that Warner was interested in having a union at the Company but Eckes asserted that it had no bearing on his decision to put Warner at the bottom of the list. Eckes was not a credible witness. He did not deny that after the picnic Warner said to him that ''things will be better around here once the union is in.'' As noted above, in the ''employee remarks'' section of the September 16, 1988 warning or suspension Warner wrote ''I . . . feel I am being harassed by company in part because . . . [of] my attempt to listen to drivers' problems and relate them to management.'' Davis is credited regarding her testimony that Eckes had a conversation in mid-October 1988 with Maluka during which it was stated that the Teskes ''didn't like the idea of . . . [Warner] starting a union.'' Maluka's assertion that this conversation did not occur because he did not know about Warner's union activity is not credited. Eckes, a supervisor, knew about Warner's activities. Maluka, therefore, also knew. Davis is also credited regarding her testimony that around the first of November 1988 she overheard Maluka and Eckes discuss the fact that ''they didn't like the idea of the union, that . . . [Warner] was causing too much trouble, they wanted to get him to quit by giving him crappy loads and harassing him.'' Roger Teske did not deny that in the fall of 1988 he told Eckes to get rid of Warner since he, Roger Teske, was getting tired of ''screwing around with him.'' Rather Roger

Teske testified that he was sure he said it but that it did not refer to unionization because he did not know of Warner's activities. As noted above, Eckes and Maluka knew of Warner's protected activities. Consequently, Roger Teske knew of Warner's concerted protected and union activities.

Roger Teske's admission that he was sure that he said that Warner was ''screwing off too much'' raises another question in that Roger Teske did not specifically deny Bodzislaw's testimony that he, Roger Teske, at the same time told Eckes to get rid of Warner. Bodzislaw is credited. There was no subjective or objective evaluation process engaged in by Maluka and Eckes regarding Warner. Eckes was told to get rid of Warner and that is exactly what occurred. Maluka and Eckes may have gone through the process regarding the remaining 14 drivers but Warner was not a part of the process. And finally Maluka did not specifically deny telling Davis that Warner would not be recalled ''because [among other things] he was trying to get the union in.''

With respect to suspensions, Maluka, who was not there at the time, expressed his opinion that Warner's explanation regarding whether he had alcohol on his breath was satisfactory. Yet Roger Teske did nothing at the time, albeit he was provided with an affidavit and a can of the involved beverage. The drink involved might smell like beer but assertedly basing a 3-day suspension on the fact that Warner consumed a beverage which contains less than one-half of 1 percent alcohol was highly questionable. The fact that Sparks would not listen to Warner's explanation, and Roger Teske, armed with an affidavit and the involved beverage, would not investigate the matter demonstrates, in my opinion, that Respondent was not interested in resolving the matter on the basis of what was actually involved. There was no business justification for this suspension, which General Counsel went into for background. Regarding the suspension for refusing a load, Respondent did not demonstrate that it ever meted out so severe a punishment in circumstances similar to those at hand. The record contains evidence that another driver received a warning for refusing a load. And at least one other driver, Davis, was not punished for refusing a load when she did not have enough hours. Warner explained that he did not have enough hours. It is questionable whether the 18.5 hours Warner had left in driving time would have been sufficient to deliver the perishable load on time. The warning speaks to ''[r]efusing to leave So-White in time to make the delivery.''[24] Yet what really was involved was how much driving time Warner had left. Warner testified that the dispatcher did not have any way of knowing how many hours he, Warner, had left in his 70-hour week and that no one called him to talk to him about this before the suspension was issued. In other words, once again Respondent was not really interested in resolving a matter based on the merits.

Respondent had no lawful reason for suspending Warner and it did not demonstrate that it laid him off in a lawful manner. The reasons given are a pretext. This is not a dual-motive case under *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). If it were to be treated as a dual-motive case, in my opinion the alleged business justifications advanced by Respondent do not demonstrate that absent Warner's concerted protected and union activities, he would have been suspended and subsequently laid off.

[24] Roger Miller also noted on the warning that Warner ''has been a problem with using up his hours by logging every stop.'' Bodzislaw testified that Respondent's management was upset with Warner because he would not put his unloading hours in the off-duty section of the log but rather placed them in the on-duty section of the log. According to Bodzislaw, Warner was making the entries in the log the proper way.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending William Warner and subsequently laying him off because he engaged in concerted protected and union activities.

4. The aforesaid unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent suspended William Warner on September 26, 1988, and subsequently permanently laid him off in violation of Section 8(a)(1) and (3) of the Act, it is recommended that Respondent offer William Warner immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges,[25] and make him whole for any loss of pay he may have suffered as a result of the discrimination against him by payment to him of a sum of money equal to that which he would have earned as wages during the 3-day suspension and during the period from the date of his permanent layoff to the date on which Respondent offers reinstatement less net earnings, if any, during said period with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[26]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, So-White Freight Lines, Inc., Plover, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending an employee because he engaged in union and concerted protected activity.

(b) Permanently laying off an employee because he engaged in union activity and concerted protected activity.

[25] I agree with the position taken by General Counsel on brief that it would be inappropriate to limit Warner's eligibility for backpay by an alleged date on which he otherwise would have been laid off after November 28, 1988.

[26] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. § 6621.

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Offer William Warner immediate and full reinstatement to his former or substantially equivalent job and make him whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him in the manner and to the extent set forth in the remedy of this decision.

(b) Expunge all records kept of William Warner's September 26, 1988 suspension and permanent layoff, and make whatever record changes are necessary to negate the effect of the disciplinary action taken.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this recommended Order.

(d) Post at its facility in Plover, Wisconsin, copies of the attached notice marked ''Appendix B.''[28] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by other material.

(e) Notify the Regional Director in writing within 20 days from the date of this decision what steps it has taken to comply.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

[Italicized portions were handwritten in original.]

The following is a list being sent to all So-White Freight Lines drivers, stating some of our concerns as employees of our company.

As it is virtually impossible to have a meeting with everyone attending, letter form seems most appropriate.

The following issues need to be attended to, the order of priority will vary and your comments will be greatly appreciated.

1. Increase daily wages; *Yes*!

under six months . . . . $65.00 in state, $80.00 out of state $90.00 long haul (retroactive after third day)

over six months . . . . $75.00 in state, $90.00 out of state, $100.00 long haul (retroactive after third day)

2. Mileage; increase .020 per mile. *Yes, but doesn't affect me.*

3. Weekly payroll; impossible to budget for hauls available. *Makes no difference to me*

4. Vacation pay; equal to average pay week.

5. Holiday pay; after six months *Yes*

6. Seniority amongst drivers. *Yes*

7. Uniform allowance *yes* paid for in full.

8. Tanker pay; in accordance to risk. *yes*

9. Unloading/Loading; $10.00 per stop (six months), after twelve hours-hotel payed. *Dont Understand*

10. Long Haul pay should not be interrupted by stops at Arco, etc. as there are no facilities. *Yes*

11. Truck jumping; self explanatory. *No thanks, especially in winter months*

12. On the road repair; increase rate from $4.00 to $9.00 per hour *Yes*

13. Sick days; three a year equal to a average daily wage.

14. Motel allowance; second day out, $15.00, third day out, 25.00, fourth and each day following, $35.00 maximum.

15. Pension plan. *Yes*

16. Plover-gas pump; quicker pump, outside light and trash container.

17. Load locks; assigned to trailers, not tractors or drivers. *Yes*

18. Equipment bonus; $150.00 yearly when no repair running. *Yes*

19. Safety bonus; paid quarterly @ .01 per mile. *Yes*

20. Fuel incentive; coordinated out bound, last in-last out. *Yes*

21. Company representatives; management/driver communication *Yes*

WE FEEL THERE IS AN EXCELLENT NUCLEUS OF DRIVERS AND THAT MOST WOULD PREFER TO STAY UNDER WORKABLE CONDITIONS. PLEASE FEEL FREE TO ADD ANY CONCERN THAT WE MIGHT HAVE OMITTED AND SIGN ENCLOSED FORM IF IN AGREEMENT WITH PROPOSALS, ALONG WITH COMMENTS.

BILL WARNER
532 W. CORNELL
STEVENS POINT, WISC. 54481

I */s/ David C. Schneider* am in agreement, in whole or in part to the afore mentioned proposals.

Thank you

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT suspend employees or permanently lay them off because they have engaged in concerted protected activity or union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the National Labor Relations Act.

WE WILL offer William Warner reinstatement to the job he was unlawfully laid off from or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole, with interest, for any loss of pay he may

have suffered by reason of his being suspended and subsequently permanently laid off.

WE WILL notify William Warner that we have removed from our files any reference to the unlawful suspension and permanent layoff and that the suspension and permanent layoff will not be used against him in any way.

SO-WHITE FREIGHT LINES, INC.